Supreme Court, U.S.
FILED
APR 5 - 2000
CLERK

(2)

No. 99-1480

IN THE

Supreme Court of the United States

MRO COMMUNICATIONS, INC.,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
NOW AT&T CORP.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AT&T CORP. IN OPPOSITION

LAURA A. KASTER
JENNIFER L. LEUBA
AT&T LITIGATION
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4838

STEVEN M. BIERMAN *
ALAN M. UNGER
JOHN J. KUSTER
SIDLEY& AUSTIN
875 Third Avenue
New York, NY 10022
(212) 906-2000

Counsel for Respondent

* Counsel of Record

April 5, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

1708

QUESTION PRESENTED

Whether MRO Communications, Inc. ("MRO") properly stated an antitrust tying claim where MRO failed to allege that AT&T Corp. ("AT&T") had any appreciable market power in the alleged tying product market to force MRO to accept the purported tying arrangement, and where MRO failed to allege the existence of any anticompetitive effects in any relevant market as a result of the purported tying arrangement?

STATEMENT REQUIRED BY RULE 29.6

AT&T has no parent company. No publicly held company owns 10 percent or more of AT&T's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT REQUIRED BY RULE 29.6	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
THE DECISIONS BELOW	4
REASONS FOR DENYING THE PETITION	6
CONCLUSION	18

TABLE OF AUTHORITIES

CASES

Page

American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125 (1946) 12
In re Audio Communication, Inc., 8 F.C.C. Rcd. 8697, 1993 WL 525815 (F.C.C. Dec. 20, 1993) 8
Beard v. Parkview Hosp., 912 F.2d 138 (6th Cir. 1990) 17
Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406 (7th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996) 12
Borschow Hosp. and Med. Supplies, Inc. v. Cesar Castillo Inc., 96 F.3d 10 (1st Cir. 1996) .. 17
Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494 (3d Cir. 1998) 17
In re Dial-It 900 Servs. and Third Party Billing and Collection Servs., 4 F.C.C. Rcd. 3429, 1989 WL 512717 (F.C.C. Apr. 12, 1989) 8
Digital Equip. Corp. v. Uniq Digital Techs., Inc., 73 F.3d 756 (7th Cir. 1996) 14
Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 112 S.Ct. 2072 (1992) .....*passim*
Fineman v. Armstrong World Indus., Inc., 980 F.2d 171 (3d Cir. 1992), *cert. denied*, 507 U.S. 921 (1993) 12
Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792 (1st Cir. 1988) 15,17
Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S.Ct. 1551 (1984) 11,16
Lee v. Life Ins. Co. of N. Am., 23 F.3d 14 (1st Cir. 1994), *cert. denied*, 513 U.S. 964 (1994) 14
Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988) 14

TABLE OF AUTHORITIES—Continued

	Page
In re Paul Ondulich, 5 F.C.C. Rcd. 3190, 1990 WL 603885 (F.C.C. May 22, 1990)	8
PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811 (6th Cir. 1997), *cert. denied*, 520 U.S. 1265 (1997)	14
Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997), *cert. denied*, 118 S.Ct. 1385 (1998)	14
Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir. 1995), *cert. denied*, 516 U.S. 987 (1995)	12
Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc., 138 F.3d 869 (11th Cir. 1998)	17
Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468 (3d Cir. 1992), *cert. denied*, 506 U.S. 868 (1992)	15,17
Twin City Sportserv., Inc. v. Charles O. Finley & Co., Inc., 512 F.2d 1264 (9th Cir. 1975)	12
United Farmers Agents Ass'n v. Farmers Ins. Exch., 89 F.3d 233 (5th Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997)	17
United States v. United States Steel Corp., 251 U.S. 417, 40 S.Ct. 293 (1920)	12

STATUTES AND RULES

15 U.S.C. § 1	4,5
§ 2	4
47 U.S.C. § 101 *et seq.*	2
§ 415	4
Fed. R. Civ. P. 12(c)	4

OTHER AUTHORITIES

Areeda & Turner, Antitrust Law, ¶ 518.3c	12

IN THE

Supreme Court of the United States

No. 99-1480

MRO COMMUNICATIONS, INC.,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
NOW AT&T CORP.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AT&T CORP. IN OPPOSITION

STATEMENT OF THE CASE

Contrary to MRO's contention, the "heart of this case" is not an antitrust claim. (Pet. at 4.) MRO's action against AT&T stems from its decision to do business with AT&T rather than AT&T's vigorous and major competitors, MCI and Sprint, and MRO's own subsequent failure to abide by the terms of its contract with AT&T. This case is at most a private contract dispute that does not involve any issues of national concern, and the Ninth Circuit's unpublished

decision dismissing MRO's antitrust claim presents no conflict with any other circuits, nor any issue beyond the correctness of the application of well-established antitrust law to the particular facts of this case.

In May 1989, MRO subscribed to AT&T's 900 number transport service, whereby calls to MRO's 900 number programs were carried on AT&T's network to MRO's facilities pursuant to AT&T Tariff No. 1, filed with the Federal Communications Commission ("FCC"). MRO and AT&T also entered into a separate, non-tariffed Billing Service Agreement ("BSA"), which was not subject to regulation under the Federal Communications Act, 47 U.S.C. § 101 *et seq.* (the "Communications Act"). Under the BSA, AT&T billed callers who called MRO's 900 number programs and collected charges from those callers in exchange for a 10 percent fee. While AT&T provided the physical means to transport calls to MRO's programs, and billed callers and collected charges from them, MRO provided all the program content, set the pay-per-call price the caller was to be charged, and conducted all of the advertising for its programs. (*See* Pet. at 5; Pet. App. at 38a (¶10).)

Before selecting AT&T in May 1989, MRO knew it could choose from a number of companies that provided both tariffed transport services and non-tariffed billing services. Indeed, in its First Amended Complaint MRO stated that it received offers from Sprint and MCI for both transport and billing services comparable to AT&T's offer. (Pet. App. at 41a (¶ 17).) MRO asserted that it did not accept the offers from either MCI or Sprint because AT&T allegedly misrepresented that it had better rates than its competitors – not because AT&T's services were somehow unique or otherwise superior. (*See* Pet. App. at 40a-41a (¶¶ 14-18).)

MRO initially had only one 900 program with AT&T, but over time executed a series of "Additional Pages" (one for each additional 900 program) to the BSA, greatly increasing

the number of 900 programs for which it utilized AT&T's services. (*See* Pet. App. at 42a (¶ 19).) In part, MRO elected to increase its business with AT&T because in April 1991 it extracted a volume discount from AT&T whereby AT&T *lowered* the billing services fee it charged to MRO by 20 percent. (App. at 7a (¶ 60).)[1]

Beginning in July 1991 and continuing through October 1992, however, AT&T discovered that MRO was using sexually charged advertisements for its 900 programs in direct violation of the express provisions that appear in the BSA, which permitted AT&T to terminate billing services for any 900 programs whose content or advertising could adversely affect AT&T's public image or good will. As a result, and in accordance with the terms of the BSA, AT&T terminated its billing and collection services for those 900 programs for which MRO was using improper sexually oriented advertisements. AT&T offered to permit MRO to continue its tariffed service for each 900 program for which billing services was terminated using a different 900 number, but MRO declined. (*See* Pet. App. at 43a (¶ 23), 47a-48a (¶ 32).)

MRO commenced this action in July 1993. MRO claimed in its original complaint only that AT&T had improperly calculated the amounts of money owed to MRO from the charges collected from callers to MRO's 900 programs, and improperly withheld other payments when MRO filed for bankruptcy in November 1992. MRO also asserted that it was entitled to an accounting. It was only after MRO was sold to a new company – and more than three years after the last time AT&T terminated billing services for any of MRO's 900 programs – that MRO first asserted that AT&T

---

[1] MRO set forth only excerpts from its 28-count First Amended Complaint. AT&T has included the remainder of MRO's First Amended Complaint as Appendix A hereto (App. 1a-30a), which demonstrates that the "heart" of MRO's case was not its antitrust claim. MRO's original complaint is attached hereto as Appendix B (App. 31a-42a.)

somehow had violated either the Communications Act or the Sherman Antitrust Act. (*See* App. 31a-42a). In fact, MRO's new management asserted 28 claims against AT&T, only one of which was an antitrust claim. (*See* App. at 1a-30a; Pet. App. at 50a-51a (¶¶ 146-147).)

THE DECISIONS BELOW

Through a series of pretrial and trial rulings, the district court dismissed each and every one of MRO's claims. In its March 20, 1996 Order, the district court adopted in full the Magistrate Judge's Report and Recommendation to grant AT&T's motion for partial summary judgment dismissing all of MRO's claims under the Communications Act arising prior to April 1993, because those claims were time-barred under the two-year statute of limitations set forth in 47 U.S.C. § 415. (*See* Pet. App. at 16a.) The district court also dismissed all of MRO's claims in which MRO asserted that a breach of the BSA could constitute a violation of the Communications Act, because the FCC previously had ruled that billing and collection services were not subject to the Communications Act. (*See* Pet. App. at 17a-18a.)

On July 9, 1996, the district court granted AT&T's motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) dismissing MRO's antitrust claim, holding that MRO's allegations failed to set forth any violation of the Sherman Antitrust Act, either under 15 U.S.C. §§ 1 or 2. The district court held that MRO had failed to allege that AT&T had sufficient power in the billing services market to force MRO to accept the purported tying of billing and transport services. This holding was based on MRO's admission that, before entering into the BSA, MRO had offers from AT&T's vigorous competitors, MCI and Sprint, which MRO would have accepted but for AT&T's alleged misrepresentations about the rates of its 900 number services. MRO thus conceded that the market for the alleged "tying product" was competitive. The district court further found that MRO had

not alleged a post-contract legally relevant market, and therefore stated no illegal post-contract tie or lock-in, and that MRO had not stated a cognizable monopolization claim. (*See* Pet. App. at 22a-32a.)

In an unpublished decision, the Ninth Circuit affirmed the district court's dismissal of each of MRO's claims. With respect to MRO's antitrust claim, the Ninth Circuit held, as had the district court, that "taking all the allegations in the pleadings as true, AT&T was entitled to judgment as a matter of law." (Pet. App. at 2a.) The Ninth Circuit first analyzed MRO's § 2 claims. In so doing, it rejected MRO's contention that merely by alleging a 50 percent market share in the purported relevant markets (here, the billing and transport services markets) its claim was sufficient, because (1) MRO's own complaint demonstrated that there was significant competition in those markets, (2) "MRO did not allege any barriers to entry or expansion in the billing or transport services markets," (3) there were no allegations that AT&T had a "specific intent to control prices or destroy competition," and (4) MRO did not allege that AT&T had engaged in "predatory or anti-competitive conduct directed at accomplishing that purpose." (Pet. App. at 4a-5a.) The Ninth Circuit also found MRO's allegation that AT&T had a higher quality of service insufficient to show barriers to entry. (Pet. App. at 5a.)

Similarly, the Ninth Circuit found that MRO failed to state any tying claim under 15 U.S.C. § 1. The Ninth Circuit held that MRO had not alleged that AT&T had sufficient market power to "force" MRO to purchase a second product, given that "[b]y its own account, MRO could have contracted with either MCI or Sprint for billing and transport services but chose to contract with AT&T. MRO's allegation that it chose to contract with AT&T because it believed AT&T would deliver better service is not enough to support an inference of market power." (Pet. App. at 5a). The Ninth Circuit also specifically considered and rejected MRO's

contention that "AT&T's practice of assigning new 900 numbers to existing customers was a form of unlawful tying" where customers like MRO had developed equity in their specific 900 numbers (Pet. App. at 6a), as MRO had argued in citing to this Court's decision in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 112 S.Ct. 2072 (1992). The Ninth Circuit found that, unlike *Kodak*, there was no relevant lock-in or aftermarket analysis applicable in this case, because "the advantage AT&T acquires over its 900 number customers is unrelated to market power and instead arises out of the nature of the business relationship. A service provider with a tiny share of the billing and transport services markets would acquire this same advantage over its customers." (Pet. App. at 7a.)

This case involves AT&T's decision to protect its public image by disassociating its non-tariffed billing services from a customer, MRO, that used sexually graphic advertising to promote its programs on AT&T's 900 numbers. MRO tried to trump up its private contract dispute with AT&T into an antitrust claim, but was properly rebuffed by the courts below. Clearly, there is no public policy or issue of national concern at stake here, and contrary to MRO's suggestion otherwise, nothing in the Ninth Circuit's opinion exempts telecommunications companies from antitrust scrutiny, nor in any way excuses their compliance with the Communications Act. Moreover, the unpublished decision of the Ninth Circuit presents no conflict with any decision of any other court. MRO raises no issues beyond the correctness of the Ninth Circuit's application of settled antitrust law to the specific facts of this case. Simply put, this is not a case worthy of this Court's review.

REASONS FOR DENYING THE PETITION

1. MRO argues that the Court should review the Ninth Circuit's dismissal of its tying claim because it is important to the "growing telecommunications industry" that AT&T

not be allowed to tie its non-tariffed billing and tariffed transport services. MRO contends that AT&T's competitors in tariffed transport services (which does not include MRO) will be harmed because AT&T will have a "leg up" on those competitors as a result of the tie. (Pet. at 15.) While MRO grossly misstates the import of the decision below in an effort to manufacture issues of purported national concern, MRO never advanced any arguments below that a valid tying claim could be stated based on the regulated/non-regulated nature of the alleged products.

Nonetheless, in affirming the dismissal of MRO's tying claim, the Ninth Circuit assumed in its analysis that both AT&T's tariffed and non-tariffed services could constitute an improper tying arrangement. The Ninth Circuit then applied well-established antitrust law to the facts MRO set forth in its First Amended Complaint before properly concluding that MRO failed to state a valid tying claim. Indeed, far from alleging that AT&T had any unfair advantage from its purported tying arrangement, MRO admitted that there was vigorous competition for its business among AT&T and its major rivals, MCI and Sprint (Pet App. at 41a (¶ 17)), and failed to allege facts establishing the purported tying arrangement had any anticompetitive effects. (*See* Pet. App. at 4a-5a.)

MRO's charge that the Ninth Circuit's ruling would allow AT&T to "defeat Congress's attempts to deregulate and promote competition in tariffed services" and allow AT&T to avoid the provisions of the Communications Act and regulation by the FCC (Pet. at 15) is ludicrous. As an initial matter, the Ninth Circuit dismissed MRO's claims that AT&T's conduct somehow violated the Communications Act for the simple reason that they were time-barred, which in no way undermines any Congressional attempts to deregulate the telecommunications industry.

Further, MRO provides no support for its sweeping pronouncement, and all the evidence below is to the

contrary. AT&T's practice of offering both its tariffed and non-tariffed services together has been the subject of FCC review on several occasions, and on each one of them the FCC has squarely rejected the notion that there is any harm to competition or consumers. *See, e.g., In re Dial-It 900 Servs. and Third Party Billing and Collection Servs.*, 4 F.C.C. Rcd. 3429, 3434 at ¶¶ 34, 37, 1989 WL 512717 (F.C.C. Apr. 12, 1989) (concluding that "tariff regulation was unnecessary to control anticompetitive behavior" of carriers providing billing services because of the existence of a "competitive market" that included "credit card companies, among others," providing those services); *In re Paul Ondulich*, 5 F.C.C. Rcd. 3190, 1990 WL 603885 (F.C.C. May 22, 1990) (holding that Communications Act claim based on the supposed "bundling" of billing and transport services "cannot lie," and reaffirming *Dial-It*); *In re Audio Communication, Inc.*, 8 F.C.C. Rcd. 8697, 1993 WL 525815 (F.C.C. Dec. 20, 1993) ("the billing and collection services provided by IXCs [interexchange carriers like Sprint, MCI and AT&T] for IPs is subject to even more competition than the billing and collection services provided by LECs in the Detariffing Order and by AT&T in the AT&T Dial It Order and thus there is even less reason to treat it as common carriage."). Indeed, as MRO itself acknowledges in its petition, the very practice about which MRO is complaining – that AT&T changes a 900 number upon termination of billing services – is *currently* before the FCC in a proceeding brought by counsel for Petitioner. (Pet. at 15 n.7.)

MRO's efforts to invoke this Court's decision in *Eastman Kodak v. Image Technical Servs.*, 504 U.S. 451 (1992) – a case in which this Court held that under certain circumstances, relevant market power can be found in an "aftermarket" of a single product brand that has derivative products (there, the parts and services for Kodak's photocopy machines) – also is unavailing. (Pet. at 17.) Tellingly, MRO concedes that it was unable to find "a reported appellate decision" suggesting that there is a "stronger rea-

son" to find market power in an aftermarket where tariffed (*i.e.*, regulated) telecommunications services are at issue.[2] (*Id.*) The reason no such decision exists declaring that an aftermarket should be found whenever the telecommunications industry is involved is that whether an aftermarket exists is a fact-based inquiry to be determined on a case-by-case basis. *Kodak*, 504 U.S. at 482, 112 S.Ct. at 2090. Here, the Ninth Circuit reviewed the facts as alleged by MRO and properly concluded that no such aftermarket existed in this case. (*See, e.g.*, Pet. App. at 4a-5a.) Clearly, no broad public policy issue is in any way involved in this action, nor implicated by the Ninth Circuit's opinion below.

2. MRO also contends that the Ninth Circuit's decision below is contrary to this Court's holding in *Kodak* for two additional reasons. First, MRO argues that the Ninth Circuit wrongly concluded that MRO's allegation that AT&T had a 50 percent market share in the non-tariffed billing services market was insufficient to establish that AT&T had any appreciable market power. (Pet. at 18.) The Ninth Circuit reviewed MRO's allegations and held that, while an allegation of a high share of a relevant market "may raise an inference of monopoly power," without more, an allegation of 50 percent market power is insufficient to state a § 2 monopolization claim, particularly where "[t]here is evidence of the defendant's inability to control prices or exclude competitors." (Pet. App. at 3a-4a.) The Ninth Circuit explained that MRO's own allegations that both MCI and

---

[2] MRO suggests there is one case – the Ninth Circuit's opinion in this case (Pet. at 17) – but nowhere did the Ninth Circuit give special consideration in its antitrust analysis to the fact that regulated telecommunications services were at issue. In any event, while MRO contends the Ninth Circuit's opinion may be relied upon as the harbinger of things to come because it is published on the internet as well as legal research services such as WESTLAW and LEXIS/NEXIS (*id.*), there is no cause for such alarm. It is an unreported opinion, and thus has no precedential value (other than for *res judicata* and law of the case purposes) under the Ninth Circuit's Local Rule 36-3.

Sprint offered the same services as AT&T, and that MCI and Sprint both had provided MRO with viable bids, provided "compelling evidence" that AT&T did not possess the requisite monopoly power for a § 2 monopolization claim. The Ninth Circuit also held that MRO failed to state an attempted monopolization claim, because MRO's First Amended Complaint contained no allegations of any barriers to entry or expansion in the billing or transport services markets, no allegations that AT&T had a specific intent to control prices or destroy competition, and no allegations that AT&T had engaged in "predatory or anti-competitive conduct directed at accomplishing that purpose." (Pet. App. at 4a-5a.)

These particular findings, while clearly dispositive of MRO's § 2 claims, render *Kodak* inapposite. The respondents in *Kodak*, for example, had not conceded that a robust, competitive market existed among large rival companies such that they had viable bids from three such companies, any one of which they were free to choose. On the contrary, in *Kodak* respondents alleged that petitioner (Kodak) had gone out of its way to engage in activities designed to put rivals out of business. *See Kodak*, 504 U.S. at 477, 112 S.Ct. at 2087-88.[3]

---

[3] MRO contends that the Ninth Circuit improperly ignored its allegations that AT&T's practices were of "no useful benefit to AT&T other than to exact a penalty" from customers, that the restriction on portability of a 900 number from one carrier to another represented a barrier to entry, and that AT&T's practices increased transport services costs by at least 10 percent. (Pet. at 11.) These allegations, even if true, change nothing. MRO simply cannot overcome its admissions that (i) there were large, rival companies of AT&T in both the billing and transport markets, MCI and Sprint; (ii) MRO had viable bids from all three of these major and intense rivals; (iii) these facts disclosed a robust, highly competitive market, as the FCC on numerous occasions has found; (iv) MRO paid lower prices for its billing services by 20 percent after entering into the BSA; and (v) MRO was free to go to any one of AT&T's rivals for 900 number services for its second, third, hundredth

The two passages in the *Kodak* decision upon which MRO relies underscore the correctness of the Ninth Circuit's opinion. The first passage from *Kodak* merely states that market power is essential for any tying claim; this Court made no mention of what might or might not constitute sufficient market power. (Pet. at 18 (*citing Kodak*, 504 U.S. at 462.)) The Ninth Circuit correctly found that MRO's admissions established that AT&T had no appreciable market power. (Pet. App. at 5a.)

The second passage upon which MRO relies (Pet. at 18 (*citing Kodak*, 504 U.S. at 464)) actually defeats MRO's tying claim. In that passage, the Court explained that appreciable market power must exist to state a valid tying claim, and reiterated that such market power is "the power to 'force a purchaser to do something that he would not do in a compet-itive market.'" *Kodak*, 504 U.S. at 464 n.9, 112 S.Ct. at 2080 n.9 (*quoting Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14, 104 S.Ct. 1551, 1558 (1984)).[4] The Ninth Circuit reviewed MRO's complaint in which MRO pleaded facts establishing that it was not "coerce[d]" to

---

or four-hundredth 900 program. (Pet. App. at 40a-41a (¶¶ 14-18); App. at 7a (¶ 60).) More-over, the lack of 900 number portability is a red herring. Portability of a 900 number from one carrier to another arises only *after* a party enters into a contract with a carrier, and is a fact of doing business with any and all carriers in the market. (Pet. App. at 45a-46a (¶ 27).) Nothing prevents any potential customer from shopping around among the carriers that provide 900 number billing and transport 900 services before deciding which of them to use.

[4] The Court in *Kodak* went on to quote the entire passage from *Jefferson Parish*, wherein the Court explained that "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Kodak*, 504 U.S. at 464 n.9, 112 S.Ct. at 2081 n.9 (*quoting Jefferson Parish*, 466 U.S. at 12, 104 S.Ct. at 1558)).

select AT&T's services, because "[b]y its own account, MRO could have contracted with either MCI or Sprint for billing and transport services but chose to contract with AT&T." (Pet. App. at 5a.) MRO cites to absolutely *no* authority to support its contention that the Ninth Circuit's analysis of MRO's insufficient market power allegations was in any way incorrect. In fact, there is ample authority demonstrating that allegations of a 50 percent market share, without more, is insufficient to establish market power.[5]

Second, MRO also asserts that the Ninth Circuit failed to apply *Kodak's* holding that it is possible to state an antitrust claim based on a single brand market where a defendant's 100 percent control of its own product may create relevant market power in an "aftermarket" of derivative products. (Pet. at 11, 18); *see Kodak*, 504 U.S. at 481-82, 112 S.Ct. at

---

[5] *See, e.g., American Tobacco Co. v. United States*, 328 U.S. 781, 811-14, 66 S.Ct. 1125, 1139-41 (1946) (noting that "it is doubtful whether 60 or 64 percent [market share] would be enough" to establish monopolization claim); *United States v. United States Steel Corp.*, 251 U.S. 417, 40 S.Ct. 293 (1920) (50 percent market share not sufficient to establish monopolization claim); *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1411 (7th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996) ("Fifty percent [market share] is below any accepted benchmark for inferring monopoly power from market share"); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) ("[N]umerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power . . . [A] market share of 44 percent is sufficient as a matter of law to support a finding of market power, if entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing."); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 201 (3d Cir. 1992), *cert. denied*, 507 U.S. 921 (1993) (fifty-five percent market share, absent other factors, is insufficient to constitute monopoly power); *Twin City Sportserv., Inc. v. Charles O. Finley & Co., Inc.*, 512 F.2d 1264, 1274 (9th Cir. 1975) ("[O]n several occasions courts have considered a 50% share of the market as inadequate to establish a proscribed monopoly"); *see also* Areeda & Turner, *Antitrust Law*, ¶ 518.3c ("there is a substantial merit in a presumption that market shares below 50 or 60 percent do not constitute monopoly power").

2090. Here, MRO contends that once it entered into the contract with AT&T, it essentially was "locked-in" to retaining AT&T's services for particular 900 numbers, because if it did not, the contract mandated that upon termination of billing services AT&T would change the 900 number assigned to MRO, thereby causing MRO to lose the good will it developed in marketing its 900 number programs. (Pet. at 18).

In *Kodak*, respondents alleged tying arrangements between parts and services in an aftermarket for Kodak photocopiers. *Id.* at 455, 112 S.Ct. at 2077. Kodak imposed the tie requiring purchase of replacement parts and services *after* its customers had purchased the copiers. This constituted a potential "lock-in" because the customers did not know at the time of contracting that they would be required to purchase both service and parts from Kodak, and by the time the policy was announced, the customers could not easily "switch" to other copiers because of the high cost of the investment. *Id.* at 476-78, 112 S.Ct. at 2087-88.

The Ninth Circuit properly rejected MRO's contention that a post-contractual aftermarket akin to the one at issue in *Kodak* was present in this case. MRO identified no derivative products or services; to the contrary, everything identified by MRO – billing and collection services, the assignment of a 900 number, and the change in 900 number upon termination of billing services – was set forth in the BSA and known to MRO before it executed that contract. (*See* Pet. at 5.) Unlike *Kodak*, the alleged tie here was created upon entering the contract, not *after* the contract already was signed and being performed. While MRO claimed that AT&T possessed a 100 percent share of the market for 900 numbers that it had previously provided to MRO, it cited to no authority to support its theory that a relevant market can be defined solely by the telephone number provided under contract or tariff. In rejecting MRO's argument, the Ninth Circuit properly found that the relevant market inquiry was

at the pre-contractual stage, because the "power" alleged was attained solely by virtue of entering into the contracts, not market power in any relevant market for products or services. (Pet. App. at 6a (*citing Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1346-47 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988)).[6]

Because MRO knew before it entered into the BSA that AT&T sold its billing and transport services together and could have chosen to obtain its services elsewhere based on that competitive information, *Kodak* is not implicated. The circuit courts are uniform in rejecting the kind of "after-market" argument proffered by MRO. *See, e.g., Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997), *cert. denied*, 118 S.Ct. 1385 (1998) (rejecting lock-in claim be-cause the purported market was created by virtue of the franchise agreements plaintiffs freely entered); *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 820 (6th Cir. 1997), *cert. denied*, 520 U.S. 1265 (1997) (rejecting plaintiffs' claim that *Kodak* aftermarket analysis applied where defendant did not change its policy after the purported lock-in of some of its customers, and no information regarding policies was withheld); *Digital Equip. Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756, 763 (7th Cir. 1996) (rejecting argument that lock-in was evidence of monopoly power where customers could "shop around" beforehand); *Lee v. Life Ins. Co. of N. Am.* 23 F.3d 14, 19-20 (1st Cir. 1994), *cert. denied*, 513 U.S. 964 (1994) (students' allegations of illegal tie between a college education and on-campus health insurance stated no claim despite assertion

---

[6] MRO contends that the Ninth Circuit relied on cases "holding that the tied and tying products constituted one market." (Pet. at 11.) MRO is wrong. The Ninth Circuit did *not* conclude that there was only one market. Rather, it relied upon the fact that the purported "power" identified by MRO was derived from the method of doing business, not from any alleged market power in the tying product, and cited to a case that so held. (*See* Pet. App. at 6a.)

that they were "locked-in" to accepting the tie during later semesters because students "know before their matriculation that they are buying a 'package' that includes at least two 'tied' products"). There simply is nothing that warrants revisiting the factual basis for dismissing MRO's misguided antitrust allegations.

Even if MRO were correct that the Ninth Circuit failed to recognize the existence of a relevant market based on the facts alleged by MRO, there is no reason to suggest that any prospective guidance is required from this Court on how to define a relevant market. MRO points to no circuit split on the issue, and indeed, there is none. That is because the definition of whether an aftermarket is or is not a relevant market is a fact-bound determination. *See Kodak*, 504 U.S. at 467-69, 112 S.Ct. at 2082-83. Nothing in the Ninth Circuit's reasoning in its unpublished (and non-precedential) decision even remotely suggests that the Ninth Circuit departed from the holding in *Kodak* that it is possible to state an antitrust tying claim that is predicated on an aftermarket. Nor did the Ninth Circuit enunciate any new standards for analyzing tying claims or determining market power. Indeed, MRO's arguments fail to raise any issues concerning longstanding antitrust jurisprudence. Rather, they simply expose the true nature of MRO's uncertworthy petition: to have this Court correct a purported error made by the Ninth Circuit which held that there was no factual basis in MRO's allegations to support an antitrust tying claim.

3. Finally, MRO conjures up a supposed split between the Ninth Circuit and two of its sister courts, the First and Third Circuits. According to MRO, the Ninth Circuit "did not directly deal with the difference between *per se* and 'Rule of Reason' tying, but did require a showing of *per se* market power," something that both the First and Third Circuits did not require. (Pet. at 13, 19 (*citing Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988) *and Town Sound and Custom Tops, Inc. v. Chrysler Motors*

Corp., 959 F.2d 468, 482 (3d Cir. 1992), *cert. denied*, 506 U.S. 868 (1992)). MRO further contends that the Ninth Circuit "refused to consider the 'Rule of Reason' alternative," which MRO argues would have permitted its tying claim to survive. (Pet. at 13.)

There is no such circuit split. Nowhere in its opinion did the Ninth Circuit set forth a rule requiring "*per se* market power" even under the rule of reason. The Ninth Circuit based its decision on the fact that MRO failed not only to allege any appreciable market power, but also failed to allege any anticompetitive effect on competition that would be actionable under either the *per se* or the "rule of reason" tests. The Ninth Circuit correctly found that MRO admitted that it received viable bids for the services at issue from AT&T, MCI and Sprint, but simply chose to contract with AT&T. (*See* Pet. App. at 5a.) Not only did MRO admit that there was no "forcing" present and that a robust competitive market was at work, but it also conceded that despite the presence of the purported "tying" arrangement, MRO was able to extract a 20 percent discount off of AT&T's fees. (App. at 7a (¶ 60).) Moreover, MRO made no allegations of any barriers to entry or the inability of AT&T's rivals to expand in the relevant markets. (Pet. App. at 4a-5a.) Such allegations – particularly that customers were free to choose among rival firms for the allegedly tied products and services – doom any antitrust tying claim under the rule of reason. Indeed, that is precisely what this Court found in *Jefferson Parish*. *See id.*, 466 U.S. at 31, 104 S.Ct. at 1568 (rejecting tying claim under rule of reason analysis where, *inter alia*, customers had the "freedom to select" services despite presence of alleged tying arrangement).

That outcome – the failure of MRO's tying claim under both a *per se* and rule of reason analysis – also would be the outcome in both the First and Third Circuits. For example, in *Grappone*, the First Circuit not only found that there was no appreciable market power to state a claim under the *per se*

test, but that even under the rule of reason analysis no "anticompetitive effect in the tied product market" was present. *Grappone*, 858 F.2d at 790-99. Similarly, the Third Circuit held that the plaintiff failed to allege sufficient market power under the *per se* test, and then examined whether under a rule of reason analysis there was any actual anticompetitive conduct caused by the tying arrangement, concluding that there was not. *Town Sound*, 959 F.2d at 486-87. Indeed, appellate courts routinely reject tying claims under both the *per se* and rule of reason tests where plaintiffs (like MRO here) fail to establish appreciable market power in the tying product market or any adverse effect on competition.[7] Thus, even if a "split" between the Courts of Appeal existed regarding whether market power in the tying product was a prerequisite for any antitrust tying claim whether under the *per se* or "rule of reason" tests, this case is not the proper vehicle for resolving the issue because MRO's antitrust tying claim fails under both approaches.

---

[7] *See, e.g., Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*, 138 F.3d 869, 876-77 (11th Cir. 1998) (affirming dismissal of tying claim under both *per se* and rule of reason tests); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 502 (3d Cir. 1998) (upholding judgment as a matter of law dismissing tying claim where no appreciable market power was demonstrated and no evidence that competition was adversely effected); *United Farmers Agents Ass'n v. Farmers Ins. Exch.*, 89 F.3d 233, 235-39 (5th Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997) (dismissal of tying claim upheld under both *per se* and rule of reason analysis where defendant had insufficient market power in relevant market and otherwise no adverse effect on competition alleged); *Borschow Hosp. and Med. Supplies, Inc. v. Cesar Castillo Inc.*, 96 F.3d 10, 16-18 (1st Cir. 1996) (no "forcing" alleged to sustain *per se* tying claim, and allegations insufficient under rule of reason); *Beard v. Parkview Hosp.*, 912 F.2d 138, 140-44 (6th Cir. 1990) (tying claim failed under both *per se* and rule of reason tests).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LAURA A. KASTER
JENNIFER L. LEUBA
AT&T LITIGATION
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4838

STEVEN M. BIERMAN *
ALAN M. UNGER
JOHN J. KUSTER
SIDLEY & AUSTIN
875 Third Avenue
New York, NY 10022
(212) 906-2000

Counsel for Respondent

April 5, 2000

* Counsel of Record